

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LENARD MAXEY,

Defendant-Appellant.

UNPUBLISHED

May 6, 2010

No. 289023

Wayne Circuit Court

LC No. 08-002347-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

Defendant, who was 16 years old at the time of this crime, did not shoot any of the victims and did not possess a weapon himself. His actual role in the robbery was to restrain one of the victims by wrapping his arms around him. Another robber pointed a gun at the victims. The person defendant was restraining was able to draw his own gun and shoot defendant, who then attempted to flee the scene. After defendant fled, there was additional gunfire and two of the robbery victims were shot by one of the robbers. One of these victims died.

I agree with the majority's analysis as to defendant's convictions for assault with intent to rob while armed, a charge punishable by any term of years or life imprisonment with the possibility of parole, as the evidence plainly supported the conclusion that he aided and abetted such a crime.

Because I am bound by the decision of the Supreme Court in *People v Robinson*, 475 Mich 1; 715 NW2d 44 (2006), I must also concur in the affirmance of defendant's convictions for felony murder and assault with intent to do great bodily harm. Defendant was convicted of these charges on an aiding and abetting theory since he did not have a weapon himself. *Robinson* provides for a murder conviction on an aiding and abetting theory, even absent the intent to kill on the part of the defendant, so long as the killing was a "natural and probable" result of the underlying felony in which he played a part. *Id.* at 14-15. Here, defendant did participate in a robbery and one of his confederates used a firearm during the robbery. Thus, under the definition of "natural and probable" applied in *Robinson*, I believe that we must affirm his conviction.

I write separately to express my concern that our present jury instructions create a risk of wrongful conviction where the charge is aiding and abetting a felony murder. Both the felony murder and aiding and abetting instructions allow for conviction under a complex, and arguably

relaxed, intent standard. The jury instructions for felony murder and aiding and abetting were written generally, so as to apply to all such cases. Given the general nature of their construction, there is, in my view, a significant risk that when these two instructions are both given in the same case, the jury may find it difficult to understand what level of intent the defendant must have actually had, or that the defendant understood that his co-perpetrator had, in order to be convicted. I believe this can be remedied by the adoption of a separate and specific instruction to be used in cases where felony murder is charged on an aiding and abetting theory. While the law presumes that jurors follow their instructions, *People v Graves*, 458 Mich 476, 486, 581 NW2d 229 (1998), it seems imprudent to accept as sufficient a set of instructions that, even to the experienced student of law, seems confusing. The need for a clear instruction is even more vital where, as here, the sentence is mandatory life without parole.

/s/ Douglas B. Shapiro